NO. 88-1925

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES M. FOSTER, M.D.,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the right to have the assistance of appointed counsel may be waived by a defendant's declaration that he did not request the appointment of counsel under the standard revealed to him by the district court, i.e., that he must be "indigent," but he also said that he had not been able to obtain competent counsel he could afford, when the appropriate standard for eligibility for the appointment of counsel under 18 U.S.C. §3006(A)(b) only required that he be "financially unable to obtain counsel" to represent him in the proceedings?

2. Whether, under such circumstances, the Trial Court could, without depriving the defendant of his constitutional and statutory rights, force the defendant to trial without the assistance of counsel by denying him a continuance, when the

defendant asserted that he had only recently obtained funds sufficient to obtain competent counsel but that such counsel would not consider representing him without his first having obtained a continuance of the trial to enable them to prepare a defense?

LIST OF PARTIES INVOLVED

All of the parties in these criminal proceedings are listed in the caption.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. _____

JAMES M. FOSTER, M.D.,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

James M. Foster, M.D., appearing herein through his undersigned counsel, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment and opinion of the United

States Court of Appeals for the Fifth Circuit which was rendered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. A, infra, pp. A1-A15) is reported at 867 F.2d 838-842. No written opinions of the District Court were rendered in these proceedings. The transcript of the proceedings of September 30, 1987, ostensibly to determine the petitioner's indigence (App. D, infra, pp. A20-A33), and excerpts from the trial transcript (App. E, infra, p. A-34-A39), including the Trial Judge's comments which are relevant to the issues presented by this petition, are reproduced in the Appendix to this petition.

JURISDICTION

The judgment of the Court below (App. B, infra, A16-A17) was rendered on Febru-

ary 28, 1989. A timely petition for rehearing was denied on March 29, 1989 (App. C, infra, A18-A19). The judgment of the Court below was issued as and for the mandate on April 10, 1989. This Court has jurisdiction to review this criminal case upon petition for a writ of certiorari, and the jurisdiction of this Court is invoked by petitioner, under the provisions of 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND CRIMINAL PROCEDURAL RULES INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.

3. The Criminal Justice Act of 1964, Pub.L. 88-455, §2, 78 Stat. 552, as amended and applicable to the charges against petitioner and the proceedings herein, codified at 18 U.S.C. §3006(A)(a-b), provides in relevant part:

> (a) **Choice of plan.**--Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:
>
> (1) Representation shall be provided for any financially eligible person who--
>
> (A) is charged with a felony * * *;
>
> * * * * *
>
> (H) is entitled to appointment of counsel under the sixth amendment to the Constitution; or

(I) faces loss of liberty in a case, and Federal law requires the appointment of counsel.

* * * * * *

(b) **Appointment of counsel.**-- * * * In every case in which a person entitled to representation under a plan approved under subsection (a) appears without counsel, the United States magistrate or the court shall advise the person that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the person waives representation by counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him. * * *

4. Rule 44(a), Federal Rules of Criminal Procedure, as amended and applicable at the time of the proceedings below, provided as follows:

(a) **Right to Assigned Counsel.** Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent that defendant at every stage of the proceedings from the initial appearance before the federal magistrate or the court throughout appeal, unless

that defendant waives such appointment.

STATEMENT OF THE CASE

On February 12, 1987, Dr. Foster, an anesthesiologist, was indicted and charged with six counts of mail fraud, i.e., the submission through the mails of allegedly false Medicare claims for anesthesiology services to eye surgery patients at the Oxford-Lafayette County Hospital in Oxford, Mississippi, between October 3 and November 9, 1983.

Following his arrest, Dr. Foster obtained representation in the Eastern District of Louisiana, where he was then residing and practicing medicine (no longer anesthesiology), by F. Irvin Dymond, Esq., a highly reputed New Orleans attorney who specialized in criminal law and who is a member of the Bar of this Honorable Court. Mr. Dymond's representation, however, was limited to the removal

proceedings because Dr. Foster could not afford his fee and expenses in connection with undertaking the petitioner's representation in Oxford, Mississippi. Dr. Foster subsequently retained R. Travis Douglas, Esq., of Kenner, Louisiana, to represent him in the Mississippi proceedings in this case.

On March 31, 1987, Dr. Foster appeared before the United States District Court for the Northern District of Mississippi, attended by Mr. Douglas, for arraignment. Dr. Foster entered pleas of not guilty upon each count of the indictment and the Court granted the defense ten days within which to file pre-trial motions. Trial was set to commence on June 8, 1987, before Honorable Neal B. Biggers, Jr. and a jury.

The only pre-trial motion filed by Mr. Douglas "on Dr. Foster's behalf" was a

motion for a continuance of the trial, on May 22, 1987, in which he asserted as grounds therefor his own ill health and lack of preparation of this case for trial. In that motion, without the assent of Dr. Foster, Mr. Douglas waived Dr. Foster's right to a speedy trial. The district court continued the trial from June 8 to July 27, 1987. The attorney-client relationship between Mr. Douglas and Dr. Foster subsequently eroded due to Mr. Douglas' neglect of Dr. Foster's case and Dr. Foster discharged Mr. Douglas as his counsel. On June 22, 1987, Mr. Douglas filed a motion in the district court seeking leave to withdraw from the further representation of Dr. Foster because he was "no longer counsel for defendant." After receiving a copy of the district court's minute entry continuing the trial to July 27, 1987, and after discharging

Mr. Douglas as his legal counsel, Dr. Foster moved the district court for a continuance of the July 27th trial date, asserting the prior omissions of his retained counsel and pointing out his own need for sufficient time to familiarize himself with the law and legal procedures in order to represent himself in view of his lack of counsel to assist him in these proceedings.

The district court fixed Mr. Douglas' and Dr. Foster's motions for hearing on July 20, 1987. Following that hearing, the district court entered orders continuing the trial and allowing defense counsel to withdraw, in the former order stating:

> 2. That defendant may proceed pro se and represent himself at the trial of this cause but he has advised the Court that he is in the process of attempting to hire trial counsel.

When no counsel for Dr. Foster had seasonably entered a notice of appearance on his

behalf, the district court ordered a hearing to be had on September 30, 1987, to inquire into the status of Dr. Foster's search for counsel and to fix a definite trial date. That hearing was had on the scheduled date. The transcript of those entire proceedings has been reproduced herein as Appendix D, infra, pp. A20 et seq.

At that hearing, Dr. Foster informed the Court, Honorable Neal B. Biggers, Jr., United States District Judge presiding, that he had sought assistance from several attorneys but that "I have not been able to find anyone which I feel comfortable with representing me as an attorney. That is, certainly anyone I can afford. The price -- the upfront expenses have been almost twice my annual salary." (Id., pp. A22-A23) He continued, "I have no money or resources * * * and therefore, at this

point I am proceeding on my own and taking counsel where I may be able to find it. Hopefully, I will have some way of managing the trial if it comes to that." (Id., A23) When the Court informed Dr. Foster that it did not know his financial condition, as Dr. Foster had inferred it did, Dr. Foster said, "I assumed that you have the records, at least those that the probation officer obtained from me, but due to bad health, I filed bankruptcy in this courthouse some three years ago, and my income since then has been to live on, but quite marginal to what they are asking in the legal business." (Id., pp. A23-A24) When the Court asked Dr. Foster to declare his income and obligations, Dr. Foster responded that he earns between $16,000 and $18,000 per year, he could not say exactly, but that "Most of it goes to living expenses and overhead and child

support. I have virtually no discretionary income." (Id., p. A24) Dr. Foster informed the Court that he was then working part time as a physician in the New Orleans area, unable to practice anesthesiology in which he is Board Certified, because he contracted hepatitis and that disease recurred "everytime I go back into anesthesiology * * *." (Id., pp. A24-A25) The following colloquy occurred between the Court, Dr. Foster and the Assistant United States Attorney who represented the Government in these proceedings (Id., p. A25 et seq.):

> THE COURT: Well, you stated that you have not been able to employ an attorney that you feel comfortable with. If the Court determined that you were indigent, and I am not sure that ever would be done, but if it were done, the Court would appoint an attorney to represent you. However, it would be an attorney that the Court chose and not one that you chose, so it is very likely that you would not be comfortable with that attorney either. That is a possibility that the Court is considering.

Do you have anything else that you wish to state?

THE DEFENDANT: I realize that it is something that neither I, nor the Court, nor the prosecuting attorneys wants me representing myself, but at this point that is the best decision I am able to come up with under the circumstances as I find it.

THE COURT: All right. Mr. Dawson, do you have anything that you wish to state in this regard?

MR. DAWSON: Your Honor, like the Court, I am not convinced at this point that the Defendant is entitled to a Court appointed attorney, and in view of his statement about his inability, between here and New Orleans, I suppose, to find counsel to represent him that he feels comfortable with, I am not sure that even if the Court appointed counsel qualified that we would have a situation where the Defendant would be pleased to the extent that he would accept that counsel over his apparent right to represent himself in the Federal Court system. It appears--

Well, first of all, let me say one thing that I do agree with Dr. Foster, and probably the Court does, is that I think it is in his best interest to be represented by trial counsel, should this case go to trial and before a jury. Dr. Foster might not be able to see that or make a judgment leading to that conclusion at this time, but I think we all can

agree that it would be to his best interest to have trial counsel.

Apparently, by statute, he has the right to represent himself if he chooses to do so. In fact, the Supreme Court of the United States has said so.

THE COURT: I have no problem with him representing himself. I am not concerned about that.

MR. DAWSON: Yes, sir. That being the case, I don't-- I cannot think of any alternative other than to set the trial date and for a date certain and proceed. We cannot make Mr. Foster or Dr. Foster go hire an attorney. However, I know the Court and the Government does not want to get in a position of a trial date being set and proceeding with the idea that Dr. Foster is going to represent himself, and then at the last minute we have counsel coming in and use that as a basis to get another continuance.

I think it should be emphasized to Dr. Foster that when this trial date is set, that excluding any unusual circumstances, that the trial will be set and--

THE COURT: Refresh my recollection. Has this been set for trial once before?

MR. DAWSON: Yes, Your Honor. It was set for trial originally in July of 1976--1987. Wait just a moment. I believe it was June of 1987, and pursuant to a motion by the Defen-

dant, one of the reasons being the necessity to hire additional counsel, this case was continued. It has been continued since that time, so-- the case was indicted, I think, back in the early Spring, around February or March of this year.

THE COURT: I see.

MR. DAWSON: So, the Defendant has had a substantial period of time to gain not only counsel but also to be very familiar with the discovery, which-- about which I would like the record to reflect that we have furnished all material under Rule 16 to Dr. Foster, and, in fact, Dr. Foster has furnished some information to us in reciprocal discovery under Rule 16, and that has been done for some time.

I don't know of any additional reason, other than the counsel issue which we now find ourselves in to postpone the case.

May I have a moment, Your Honor?

THE COURT: All right.

MR. DAWSON: I do notice, Your Honor, that the Defendant has filed separate motions, which we have responded to, and maybe before the magistrate and maybe some before Your Honor. We--they are mainly motions that do not require either evidentiary or oral argument, but other than that, I think the case is in the posture for trial.

THE COURT: All right. Now, Dr. Foster, you really haven't asked the Court to appoint you an attorney. Before the Court would even consider that, I would have to be satisfied that you are indigent and that would require financial disclosure from you, and I would allow the Government to put you on the stand and conduct an examination of you, if questioned, to satisfy myself that you are indigent. I don't know, however, if you even want us to go into that.

Are you going to ask the Court or do you wish to ask the Court to appoint an attorney based on your indigency?

THE DEFENDANT: No, Your Honor. I never entertained representing myself as an indigent or asking or requesting the Court to appoint an attorney, nor am I trying to delay the proceedings, in whatever fashion they ultimately turn out.

I am a non-professional defending myself in a serious matter that can have serious consequences for me. I do need all of the help I can get, sort to speak, from the standpoint that I am-- I still do not have a clear bill of particulars, which I have motioned for, to prepare an adequate defense of the charges that I do not even understand, and I did not participate much in the --

THE COURT: So, you are telling the Court, then, that you are not requesting an attorney be appointed for you at this time?

THE DEFENDANT: That's correct.

THE COURT: You did not request an indigency hearing?

THE DEFENDANT: That's correct, Your Honor. I did not request an indigency hearing.

THE COURT: All right. Then the Court is going to set the case for trial, and it will be up to you to either be here to represent yourself or to have counsel with you at that time.

THE DEFENDANT: Yes, sir.

It was thus with the understanding that he must have been "indigent" in order to qualify for the appointment of counsel to represent him in these proceedings that Dr. Foster turned down the Court's offer to inquire into whether he qualified for the appointment of counsel. Dr. Foster was not informed, and he did not know, that he would have qualified for the appointment of counsel if he were "financially unable to obtain counsel" to assist him in his defense.

Subsequently, Dr. Foster was informed of the possible dates on which the Court would set this case for trial. He wrote the Court a letter requesting that it set the trial in January of 1988, the latest of the suggested dates. On October 20, 1987, the Court set the trial of this cause to commence before a jury on January 25, 1988.

On January 20, 1988, defendant filed a motion to continue the trial in order to enable him to have the benefit of the assistance of counsel with whom he had consulted and whom he could then pay out of recently obtained funds, annexing thereto an affidavit in which he stated:

1. Prior to a few days before this 19th day of January, 1988, Dr. Foster did not have sufficient funds to retain competent legal counsel, nor qualify for an O.I.D. attorney;

2. However, just recently he felt he was in a position to retain counsel and spoke to Hon. Sebastian Moore, of Jackson, Ms., with

whom he has had numerous conferences along with Hon. Grady Tolison of Oxford.

3. Both attorneys have advised they would consider representing him.

4. Fee arrangements have been discussed and affiant feels he has a very good chance of employing one of said counsel if given a continuance, as both counsels [sic] indicated to him that they would need more time to prepare for the trial in this matter if they became counsel of record.

5. Affiant states he has acted in good faith as to retaining counsel and that the request for this continuance is not arbitrary or capricious.

The Government filed a response to that motion in which it misinformed the Court, we believe unintentionally, as follows (underscored portions are false):

7. * * * During this hearing [September 30, 1987] the Court specifically advised the defendant of his right to counsel, made inquiries concerning the defendant's efforts to hire counsel, and whether or not the defendant wished a hearing to determine whether he qualified for appointment of counsel. The defendant advised the Court that he was not indigent for the

purpose of hiring counsel and that his efforts to retain counsel had been unsuccessful due in part to disagreements concerning the fee. The defendant then advised the Court that he intended to represent himself at trial, and the Court made further inquiry concerning the defendant's waiver of his right to counsel, and his intentions to proceed pro se. * * *

* * * * * *

10. On January 20, 1988, the United States Attorney's Office received a motion for continuance filed by the defendant, essentially claiming that as of a few days prior to January 19, 1988, the defendant feels that he is financially able to hire an attorney and that he has spoken with two attorneys other than Kehoe or Simmons. The motion further states that these attorneys "would consider" representing the defendant and that "if" they were counsel of record that they would need more time to prepare for trial. At no time has defendant ever indicated he was not financially able to retain counsel.

* * * * * *

12. * * * * * *

* * * It is equally clear that since the return of the indictment the defendant has been

> financially able to retain counsel, but that he is either not satisfied with the performance of counsel hired or the amount of the fee required to retain counsel. * * * [Emphases added.]

The Court denied Dr. Foster's motion for a continuance and instructed its secretary to call Dr. Foster and so notify him.

During the trial, out of the presence of the jury when Dr. Foster and Mr. Dawson were at the Bench for another purpose, Dr. Foster sought to demonstrate to the Court the source of the funds to which reference was made in his affidavit of January 19, 1988, attempting to establish his good faith in his efforts to obtain counsel and thereby mitigate the effect of any harm that might be caused by the Court's misimpression that he had deliberately delayed these proceedings or had deliberately declined to attempt to obtain counsel to present his defense. Excerpts of the relevant portions of that colloquy are

annexed hereto as Appendix E, infra, p. A34 et seq.

The trial proceeded and Dr. Foster was subsequently convicted on all six counts of the indictment. He timely appealed to the Court below.

The Court of Appeals, recognizing that the standard of 18 U.S.C. §3006(A)(b) of "financial inability to obtain counsel" is less stringent than that of "indigency," observed that "courts often, as did the trial court in this case, use the term 'indigency' as a shorthand expression to refer to a defendant's financial inability to hire counsel. Although the trial judge in this case used the term 'indigency' instead of 'financial inability,' the record shows that the defendant understood his right to have appointed counsel and knowingly and intelligently waived his right. The defendant seemed to be princi-

pally concerned with findng [sic] a lawyer he could be 'comfortable with', although he was also looking for one whose fee he could afford." (App. A, infra, pp. A5-A6) The Court below was also cognizant of the following principle of law, enunciated by this Court in the case of Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) which it cited, that "To waive the right to appointed counsel a defendant must not only comprehend the nature of the right but also must voluntarily relinquish the right." (App. A, infra, pp. A8-A9) The Court below then stated that in the determination whether a waiver is effective it is appropriate to consider several background factors of the accused, including age, education and occupation. The Court below then wrote (App. A, infra, pp. A9-A10):

> Dr. Foster is an intelligent, articulate, and highly educated medical professional. There is no

evidence in the record that at the September 30th status hearing or at any other time, the defendant was confused by the court's use of the term "indigency" or that he distinguished between indigency and financial inability. The defendant twice refused the court's offer to hold a hearing to determine whether he was entitled to appointed counsel; each time he stated emphatically that he had not entertained the idea of requesting the court to appoint counsel. He would rather try the case himself. The defendant stated that he realized that not having counsel was a serious matter and that he was aware that the court and the prosecuting attorney thought that it was in the defendant's best interest to have an attorney. During the period between indictment and trial the defendant retained and discharged counsel and consulted two legal advisors who attended conferences and hearings and filed motions on his behalf. At least one of the defendant's legal advisors was present at the trial. In an October 19, 1987 letter to the court, the defendant requested a January 1988 trial date although he still had not secured counsel. The defendant made a calculated decision to represent himself in the event that he could not hire counsel he was comfortable with before trial.

The Court below held that once a defendant has been informed of his right to appoint-

ed counsel, it is incumbent upon him to notify the court of his desire to have counsel appointed because of his financial inability to obtain counsel. (Id., p. All) While defendant knew of the general right of an "indigent" person to have counsel appointed for him, he did not know that he would qualify for the appointment of counsel if he were merely "financially unable to obtain counsel" to represent him in these proceedings. It is respectfully contended herein that, without such knowledge, he could not have and did not waive his right to have the assistance of counsel appointed by the Court to represent him in these proceedings.

REASONS FOR ALLOWING THE WRIT

In our respectful view, the judgment and opinion of the Court below violate every precedent of this Court pertaining to the Sixth Amendment right to have

counsel appointed for one who cannot afford to provide such essential benefit for himself, as well as every precedent of this Court pertaining to the waiver of fundamental constitutional rights.

In our further respectful view, the Court below discriminated against Dr. Foster because of his education as a medical professional and his being an articulate person, which discriminatory approach to its review of the record on appeal caused it to make assumptions which simply are not justifiable upon any objective review of the proceedings which are relevant to the issues of this petition.

1. In every reference by the Trial Court to the standard Dr. Foster would have to meet to satisfy the Court of his entitlement to the appointment of counsel, the Trial Court used the term "indigent" or some other form of the same word. This

was the first occasion in which Dr. Foster found himself involved in a legal proceeding, especially a criminal proceeding in which his liberty was at risk, and he was called upon to make legal decisions for himself without the assistance of an attorney. That he is an educated man suggests that he would have construed what the Trial Judge said in the manner a learned man, knowledgeable of the English language but unfamiliar with judicial proceedings and the shorthand terms used therein, would have done. As an intelligent man, he would have assumed that the Trial Judge stated the correct legal standard for eligibility for the appointment of counsel. Therefore, the legitimate conclusion which should have been drawn by the Court below is that Dr. Foster would have concluded and did conclude that the Trial Court's statements

relative to indigency indicated that he was not entitled to the appointment of counsel unless he were destitute or povern.

Webster's Ninth New Collegiate Dictionary (©1987), verbo "indigence," p. 614, defines that term to mean:

> a level of poverty in which real hardship and deprivation are suffered and comforts of life are wholly lacking. Syn. see POVERTY.

That same lexicon defines the word "indigent" to mean "suffering from indigence | IMPOVERISHED." (Ibid.) Even the legal dictionaries suggest the same meaning of those terms. For example, Black's Law Dictionary, Special Deluxe Fifth Edition (©1979), p. 695, defines the term "indigent" to mean:

> In a general sense, one who is needy and poor, or one who has not sufficient property to furnish him a living nor anyone able to support him to whom he is entitled to look for support. Term commonly used to refer to one's financial ability, and ordinarily indicates one who is

> destitute of means of comfortable subsistence so as to be in want. [Citation omitted]

The legal standard to qualify for the appointment of counsel in federal criminal proceedings is that a defendant be "financially unable to obtain counsel." 18 U.S.C. §3006(A)(b). That statute requires that in every case in which a person appears before a federal magistrate or judge in a felony prosecution without the assistance of counsel that "the United States magistrate or the court shall advise the person that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel." (Ibid.)

The Court below recognized that "Financial inability to obtain counsel is, of course, a less stringent requirement than is indigency." (App. A, infra, p.

A5, 867 F.2d at 839) For that proposition it cited United States v. Moore, 671 F.2d 139 (5 Cir. 1982), cert den., 461 U.S. 859, 104 S.Ct. 183, 78 L.Ed.2d 163 (1983); United States v. de Hernandez, 745 F.2d 1305, 1310 (10 Cir. 1984); United States v. Harris, 707 F.2d 653 (2 Cir.), cert. den., 464 U.S. 997, 104 S.Ct. 495, 78 L.Ed.2d 688 (1983). Petitioner had quoted in his original brief in the Court below, at page 37 thereof, the following language from United States v. de Hernandez, supra, 745 F.2d at 1310:

> * * * Without commenting on the evidence supporting this finding, we note that 18 U.S.C. §3006(A)(b) looks not to the indigency of the accused but whether he is "financially unable to obtain counsel." This standard was not applied by the magistrate nor at trial as it should have been. The trial judge did not conduct an inquiry on the point and the magistrate had applied the wrong standard.

The Court below, however, then proceeded to note (App. A, infra, p. A5, 867 F.2d at 839):

> We are mindful, however, that courts often, as did the trial court in this case, use the term "indigency" as a shorthand expression to refer to a defendant's financial inability to hire counsel. * * *

For that proposition it cited United States v. Moore, supra, 671 F.2d at 141, in which another Panel of the Fifth Circuit had written:

> the Congress was careful in the Criminal Justice Act of 1964 to avoid the use of the term "indigent" in setting the standard under which counsel must be appointed for financial reasons, even though the courts often use "indigency" as a shorthand expression to describe the problem of the appointment of counsel for those who cannot afford to hire counsel. * * *

Neither that decision nor Davis v. Page, 618 F.2d 374, 382 (5 Cir. 1980), and United States v. Nichols, 841 F.2d 1485, 1504 (10 Cir. 1988), also cited by the Court below for the proposition that

"indigency" is a "shorthand term" for "financial inability to obtain counsel," sanction the use of legal shorthand as a substitute for providing an accused with the statutorily mandated advice that "counsel will be appointed to represent him if he is financially unable to obtain counsel." 18 U.S.C. §3006(A)(b).

Moreover, it is not that of which a Court of Appeals or the district courts of the United States are "mindful" that counts. They are not the ones exercising the waiver of constitutional rights and they are not the ones who must be informed of the appropriate standards in order to make a knowing and intelligent waiver of the rights required by the Constitution and procedurally provided by the statute. Congress not only required that the Court conduct an appropriate inquiry to satisfy itself "that the defendant is financially

unable to obtain counsel," it required that "the United States magistrate or the court shall advise the person that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel." 18 U.S.C. §3006(A)(b). Congress' care in using the same phrase to describe the required advice and the standard to be applied by the Court in determining whether to appoint counsel, and its care in avoiding the "shorthand expression," "indigency," as the standard to be conveyed to an accused or to be applied by the district courts, is clearly indicative of the fact that Congress did not intend that an accused or the courts act under the misapprehension that an accused must be indigent to qualify for the appointment of counsel. The record in this case, however, clearly establishes

that Dr. Foster acted under that misapprehension as a direct result of the Trial Court's failure to follow its statutorily prescribed duty to inform him that "counsel will be appointed to represent him if he is financially unable to obtain counsel." (Ibid.) That is apparent from a cursory, and obvious from a studied, analysis of the record of the proceedings on which the Court below relied to affirm the petitioner's conviction which was obtained when he was forced to represent himself in this case.

The Court below held that "the record shows that the defendant understood his right to have appointed counsel and knowingly and intelligently waived his right. The defendant seemed to be principally concerned with finding a lawyer he could be 'comfortable with,' although he was also looking for one whose fee he could

afford." (App. A, infra, pp. A5-A6, 867 F.2d at 839-840) Petitioner would have been "comfortable with" competent counsel. He informed the district court that such counsel with whom he had consulted about legal representation in these proceedings, "The price -- the upfront expenses have been almost twice my annual salary." (App. D, infra, pp. A22-A23) In addition to the petitioner's statements which were excerpted in the opinion of the Court below (App. A, infra, pp. A6-A7, 867 F.2d at 840), Dr. Foster also informed the Court that he had "virtually no discretionary income" after living expenses, overhead and child support payments were made (App. D, infra, p. A24); and that (App. D, infra, p. A23):

> I have no money or resources, as I think the Court is probably aware, and therefore, at this point I am proceeding on my own and taking counsel where I may be able to find it. Hopefully, I will have some way

of managing the trial if it comes to that.

The Court below also concluded (App. A, infra, pp. A9-A10, 867 F.2d at 841):

> The defendant twice refused the court's offer to hold a hearing to determine whether he was entitled to appointed counsel; each time he stated emphatically that he had not entertained the idea of requesting the court to appoint counsel. He would rather try the case himself. * * *

The real proceedings are reflected in the following excerpts to which the Court below adverted but incompletely quoted, the bracketed materials indicating material omitted by the Court below (Compare App. A, infra, pp. A6-A7, 867 F.2d at 840 with App. D, infra, pp. A25-A26, A31-A32):

> THE COURT: Well, you stated that you have not been able to employ an attorney that you feel comfortable with. If the Court determined that you were indigent[, and I am not sure that ever would be done, but if it were done,] the Court would appoint an attorney to represent you.
>
> [However, it would be an attorney that the Court chose and not one that you chose, so it is very likely that

you would not be comfortable with that attorney either. That is a possibility that the Court is considering.

Do you have anything else that you wish to state?]

THE DEFENDANT: I realize that [it is something that] neither I, nor the Court, nor the prosecuting attorneys wants me representing myself, but [at this point] that is the best decision I am able to come up with under the circumstances [as I find it].

-----o-----

THE COURT: All right. Now, Dr. Foster, you really haven't asked the Court to appoint you an attorney. [Before the Court would even consider that, I would have to be satisfied that you are indigent and that would require financial disclosure from you, and I would allow the Government to put you on the stand and conduct an examination of you, if questioned, to satisfy myself that you are indigent. I don't know, however, if you even want us to go into that.]

Are you going to ask the Court or do you wish to ask the Court to appoint an attorney based on your indigency?

THE DEFENDANT: No, Your Honor. I never entertained representing myself as an indigent or asking or requesting the Court to appoint an attorney, [nor am I trying to delay the pro-

ceedings, in whatever fashion they ultimately turn out.

I am a non-professional defending myself in a serious matter that can have serious consequences for me. I do need all of the help I can get, sort to speak, from the standpoint that I am-- I still do not have a clear bill of particulars, which I have motioned for, to prepare an adequate defense of the charges that I do not even understand, and I did not participate much in the --]

THE COURT: So, you are telling the Court, then, that you are not requesting an attorney be appointed for you at this time?

THE DEFENDANT: That's correct.

THE COURT: You did not request an indigency hearing?

THE DEFENDANT: That's correct, Your Honor. I did not request an indigency hearing.

Dr. Foster never declined an inquiry into the issue whether he was "financially unable to obtain counsel"; he declined an inquiry into the issue whether he was "indigent." He was not concerned about the Court and the Government knowing the extent of his financial condition. As he

pointed out to the Court, the probation authorities had already interviewed him and obtained substantial financial information from him. Moreover, other financial records were on file in the district court in his bankruptcy suit. Under these circumstances, it would be absurd to conclude that he refused a hearing because he did not want to disclose his financial condition. He simply knew he was not "indigent," the standard posed to him as the test for the appointment of counsel, and he knew he would not qualify for the appointment of counsel under that standard.

Each time the district court offered to inquire into Dr. Foster's financial condition, it informed him that it would appoint counsel for him if the Court determined he was "indigent." On one such occasion, the Court discouraged the ac-

ceptance of such an offer, saying: "I am not sure that ever would be done * * *." One view of the district court's comments to Dr. Foster might even have suggested to him that a Court-appointed attorney would have been someone less acceptable than the attorneys he had already rejected as being unacceptable to the extent he felt uncomfortable with having them represent him. Dr. Foster never suggested that he "would rather try the case himself," as the Court below held. He stated that he did not want to represent himself any more than the Court and Government did not want him to do so but that, under the circumstances as he knew them, that was the best decision he was able to make. He told the Court he was "taking counsel where [he] may be able to find it" and that "Hopefully, [he would] have some way of managing the trial if it comes to that."

When Dr. Foster appeared before the Court without counsel, it became the mandatory duty of the district court, pursuant to 18 U.S.C. §3006(A)(b), to advise him that the Court would appoint an attorney to represent him if he were "financially unable to obtain counsel." He was never informed of that standard for qualifying for the right to have appointed counsel. Instead, he was informed of the more stringent standard which he knew he could not meet. There was no evidentiary or legal basis for the Fifth Circuit's assumption, much less its holding, that petitioner "understood his right to have appointed counsel and knowingly and intelligently waived it." He knew only of an "indigent" person's right thereto and did not assert a right which, based upon the information related to him, was unavailable in his situation.

2. Since this Court's decision in Johnson v. Zerbst, 304 U.S. 458, 463, 58 S.Ct. 1019, 1022-23, 82 L.Ed. 1461, 146 A.L.R. 357 (1938), the following principle of constitutional law has prevailed:

> * * * The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.

Dr. Foster clearly did not have the assistance of counsel, except for the brief period during the initial phase of the prosecution. Even then, he did not have the benefit of the effective assistance of counsel. His previously retained attorney acknowledged in written pleadings filed in these proceedings less than one month before the first trial date that he had not prepared a defense on Dr. Foster's behalf. Petitioner was entitled to have the assistance of counsel at every stage of the accusatory process, including

investigation, preparation and presentation of his case to the Court and jury. Johnson v. Zerbst, supra; Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 63-64, 77 L.Ed. 158, 84 A.L.R. 527 (1932); Hamilton v. Alabama, 368 U.S. 52, 54, 82 S.Ct. 157, 158-159, 7 L.Ed.2d 114 (1961); United States v. Wade, 388 U.S. 218, 226, 87 S.Ct. 1926, 1932, 18 L.Ed.2d 1149 (1967); Coleman v. Alabama, 399 U.S. 1, 7, 90 S.Ct. 1999, 2002, 26 L.Ed.2d 387 (1970). In order for petitioner's conviction to be sustained when he was not represented by counsel at practically all of the critical stages of the proceedings against him, it must be established that he waived his right to have the assistance of counsel appointed for him, or that he was not entitled to the appointment of counsel. As to the latter, there is no

evidence that he had any means with which to retain adequate counsel.

The right to have the assistance of counsel, appointed by the Court when an accused is financially unable to obtain counsel, is not reserved to the destitute or the ignorant. In Johnson v. Zerbst, supra, quoting copiously from Powell v. Alabama, supra, this Court said (304 U.S. at 463, 58 S.Ct. at 1022-23, 82 L.Ed. at 1461, 146 A.L.R. 357):

> The " * * * right to be heard would be, in many instances, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel

at every step in the proceedings against him." * * *

This Court, in Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), held that even an attorney had the absolute constitutional right to have the effective assistance of counsel. The degree of Dr. Foster's medical education or his education in general did not disqualify him from the right to have the benefit of counsel appointed by the Court where he could not afford to obtain adequate representation for himself.

This Court, in Johnson v. Zerbst, after pointing out the need even an intelligent and educated layman would have for the assistance of counsel in federal criminal proceedings, then enunciated the following standard for determining the waiver of the constitutional right to counsel, which standard has become the norm under which every waiver of constitu-

tional rights has since been assessed (304 U.S. at 464, 58 S.Ct. at 1023, 82 L.Ed. 1461, 146 A.L.R. 357):

> It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Even if, as suggested by the Court below, Dr. Foster declined to request the appointment of counsel or to submit to an inquiry about his financial condition to determine his eligibility for appointment of counsel, the fact is that he did not intentionally relinquish or abandon a "known right or privilege," viz., the right to have the appointment of counsel to represent him in these proceedings if

he were not indigent but was "financially unable to obtain counsel." 18 U.S.C. §3006(A)(b). That was the right at issue; and that is what was required to be known by him in order for it to have been found that he made a knowing and intelligent choice to give up that right. Moreover, the choices which appeared to be presented to Dr. Foster were to either accept the services of any attorney who would take his small amount of money and do nothing for him, as his previous attorney had apparently done, or to represent himself. He was not informed that the very financial condition related by him to the Court qualified him under the statute for the appointment of counsel. The Criminal Justice Act of 1964, codified at 18 U.S.C. §3006(A)(a), provides that he was entitled to the appointment of counsel if he were "financially unable to obtain adequate

representation." That is precisely what Dr. Foster informed the district court he had been unable to afford.

Under the decisions of this Court construing the right to have counsel appointed for one who cannot afford to provide such services for himself, which have been only briefly touched upon herein in view of this Court's superior familiarity with them and a number of this Court's members having participated in the rendering of the more recent ones, it is very clear that the Court below erroneously held that the petitioner waived his right to have counsel appointed to represent him in these proceedings.

The congressional and constitutional mandate that a person appearing before the court without representation be specifically advised that counsel will be appointed for him if he is "financially unable to

obtain [adequate] counsel" for himself was disregarded by the trial court. The affirmance by the Court of Appeals, especially based upon the record made in the district court which clearly shows that petitioner was never provided adequate advice about the conditions under which he would be qualified for the appointment of counsel to have enabled him to have knowingly and intelligently waived a right he did not comprehend, sanctions such an extreme departure from the standards of constitutional law, as enunciated by this Court in every relevant decision on the issue presented, as to merit this Honorable Court's exercise of its discretion to review this case.

Moreover, if the decision in this case is permitted to stand, then every intelligent and educated defendant who finds himself charged with crime in a

federal criminal proceeding, who lacks the means with which to retain his own counsel, is subject to being told that he qualifies for the appointment of counsel to represent him only if he is indigent and, based upon his knowledge of the common meaning of that word, as distinguished from its shorthand legal meaning, foregoing making a request for the appointment of counsel for which he is legally qualified and thereby forced to attempt to defend himself as Dr. Foster was.

In no case has this Honorable Court ever sanctioned the use of legal shorthand expressions as a substitute for providing a defendant with information which would be necessary for him to make a knowledgeable, intelligent and intentional choice to waive or exercise a valuable constitutional right. Particularly where Congress, in

18 U.S.C. §3006(A)(b), has made it mandatory that federal judicial authorities inform an accused of his right to have counsel appointed for him if he is "financially unable to obtain counsel," there is especially good reason for this Honorable Court to intervene and correct the unjust and illegal result in this case.

When an accused has been deprived his Sixth Amendment right to have the effective assistance of appointed counsel, any conviction obtained must be reversed on the basis of a per se prejudice rule. Glasser v. United States, supra; Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705 (1967); Argersinger v. Hamlin, 407 U.S. 25, 37, 92 S.Ct. 2006, 2012, 32 L.Ed.2d 530 (1972); Brewer v. Williams, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); Hollo-

way v. Arkansas, 435 U.S. 475, 489, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978).

Petitioner recognizes the great burden upon this Honorable Court due to the great number of petitions for the issuance of a writ of certiorari to review both frivolous and highly meritorious issues of statutory and constitutional law. Petitioner respectfully suggests that this case need not take a great deal of this Court's time to dispose of it in a just and fair way. The facts are straightforward, revealed by the transcript of the relevant proceedings which has been reproduced herein at Appendix D, infra. The law is very clear upon the issues presented by this case. For whatever reasons the Court below had, this case has slipped through the cracks of justice and petitioner stands condemned to

prison without having had a fair trial with the benefit of legal representation.

This Honorable Court is empowered to grant a petition for a writ of certiorari and to summarily reverse a lower court judgment upon a Per Curiam opinion without the necessity of further briefs or oral argument. See, e.g., Montana v. Hall, 481 U.S. ____, 107 S.Ct. 1825, 95 L.Ed.2d 354 (1987); City of Newport v. Iacobucci, 479 U.S. 92, 107 S.Ct. 383, 93 L.Ed.2d 334 (1986); Payne v. Virginia, 468 U.S. 1062, 104 S.Ct. 3573, 82 L.Ed.2d 801 (1984); Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975). To be fair to the Government, this Court could invite it to respond to this petition and show why, if there is any reason, this petitioner is not so clearly entitled to the relief sought as to justify summary reversal of the judgment below. Of course, we are not

suggesting that this case does not present substantial issues which warrant this Court's intervention; it is only suggested that petitioner is so clearly entitled to the relief sought that the time and expense of preparing briefs and the expense of transportation and lodging of his counsel in connection with presenting oral argument to this Court--neither of which he can afford--should not be imposed upon him in order for justice to be done, especially in this relatively simple, wrongly decided case, when there is a simpler, more expedient and less expensive way in which for this Honorable Court to do the just thing in this case.

3. The Court below, citing United States v. Mitchell, 777 F.2d 248, 256 (5 Cir. 1985), and United States v. Casey, 480 F.2d 151 (5 Cir. 1973), held that the Trial Court did not abuse its discretion

when it denied petitioner's motion for a continuance to enable him to obtain the assistance of counsel. (App. A, infra, pp. A12-A13, n. 11 at A15, 867 F.2d at 841-842 and n. 11 at 842) Those cases are inapposite.

In Mitchell, a defendant selected an attorney whom both he and the attorney knew would have a conflict with the trial date fixed by the Court, yet neither informed the Court when the date was set or less than two weeks before the scheduled trial date that the defense attorney had a scheduling conflict. In that case, the district court applied the six factors enunciated by the Fifth Circuit in Gandy v. State of Alabama, 569 F.2d 1318 (5 Cir. 1978), and concluded (777 F.2d at 257):

> (1) the delay would have been several months considering the projected length of Schaffer's previous commitment; (2) Schaffer had no associates, but a lawyer who shared office space with him represented two of the other defendants (and presumably could have

represented Mitchell); (3) no other continuances were granted; (4) the trial date was set well in advance so that all attorneys, witnesses and the court could be present; (5) Mitchell had knowledge of his attorney's conflict near the time of arraignment; (6) Mitchell and Schaffer requested the continuance in bad faith for the purpose of delay; (7) Mitchell had a one-month opportunity to retain other counsel; and (8) Mitchell attempted to manipulate the court's schedule by retaining an attorney whom he knew to have a conflict.

The Gandy line of cases, including Mitchell, hold that the "right to choose counsel may not be subverted to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice." Gandy, supra, 569 F.2d at 1323. The Casey case, which preceded the decision in Gandy, held the same thing. In United States v. Terry, 449 F.2d 727 (5 Cir. 1971), on which all of those cases were based, the Court held that failure to secure counsel of the defendant's choice within a reasonable time operates as a

waiver of his right to counsel. All of those cases, however, held that an accused is entitled to a fair and reasonable opportunity to obtain counsel of his choice. E.g., Mitchell, supra, 777 F.2d at 256; Gandy v. Alabama, supra. No such opportunity existed in this case.

Petitioner did not have sufficient means with which to hire competent counsel and the Trial Court did not inform him of the appropriate standards under which he would have qualified for and requested the appointment of counsel to assist him in his defense. In each of the cases cited by the Court below, and those cases discussed within them, the defendant had the means to employ counsel and simply refused to employ counsel who could appear and represent him at the appointed time. Those defendants did not exhibit the good

faith petitioner did in attempting to get counsel to represent him.

In Unger v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964), this Court considered an attorney's claim that he had been denied the right to have the assistance of counsel of his choice when it denied him a continuance to obtain and prepare a defense with the assistance of counsel. Although holding that the attorney in that case had not made a diligent effort to obtain counsel and that his motion for a continuance had been made for delay and not in good faith, this Court enunciated the following standards for determining when a continuance for the purpose of obtaining counsel should be granted (376 U.S. at 589, 84 S.Ct. at 849-850, 11 L.Ed.2d at 931):

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even

> if the party fails to offer evidence or is compelled to defend without counsel. * * * Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. * * * There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. * * * [Citations omitted]

In the instant case, Dr. Foster's request for a continuance was justifiable. He had only recently obtained funds sufficient with which to hire counsel. He had not previously been advised of his right, in his previous financial condition, to have the assistance of appointed counsel. Significantly, when Dr. Foster attempted to show to the Trial Court the check he had recently received, the Court said (App. E, infra, p. A37):

> * * * I will take your representation about it. * * * I have no questions about your representa-

> tion that you did have money recently come into your possession that you did not have previously.

It was only as a result of that money that Dr. Foster was able to get two competent attorneys to even consider representing him for any funds reasonably available to him, and those attorneys would consider representing him only if the Court granted a continuance to enable them to prepare his case. Under those circumstances, we respectfully submit that the Trial Court did not provide petitioner a fair and reasonable opportunity to obtain competent counsel to defend him. That effectively denied petitioner's Sixth Amendment right to counsel as well.

CONCLUSION

All of the relevant jurisprudence of this Honorable Court is in favor of granting this petition for a writ of certiorari. The decision of the Court below

misapplied this Court's precedents and misinterpreted the facts which were evident upon mere cursory perusal of the proceedings before the Trial Court when it was advising the petitioner about his right to have appointed counsel if he were "indigent," rather than if he were "financially unable to obtain counsel" as required in 18 U.S.C. §3006(A)(b). When a person has been denied the assistance of counsel in violation of the Sixth Amendment to the Constitution, there is no need to show prejudice; reversal is compelled under a per se rule devised by this Honorable Court. This Court should exercise its discretion in a manner to correct this patently unjust and illegal judgment, either by summarily reversing it or by granting a writ of certiorari and deciding this case after briefs and oral argument of the parties.

Respectfully submitted,

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PROOF OF SERVICE

I, Richard A. Tonry, counsel of record for James M. Foster, M.D., and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 27th day of May, 1989, I served the foregoing Petition for a Writ of Certiorari on the United States of America by mailing three copies in a duly addressed envelope, with first-class postage prepaid, on The Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and an additional copy was served upon Mr. Thomas W. Dawson, Assistant United States Attorney, Northern District of Mississippi, Post Office

Drawer 886, Oxford, Mississippi, and on Honorable Neal B. Biggers, Jr., United States District Judge, to evidence timely filing hereof in order to permit the maintenance of the stay of execution of sentence of the Court pending review and determination of this case by this Court.

It is further certified that all parties required to be served have been served.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-4360

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

JAMES M. FOSTER, M.D.
Defendant-Appellant

Appeal from the United States District Court for the Northern District of Mississippi

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(February 28, 1989)

Before WISDOM, GARWOOD, and DAVIS, Circuit Judges.

WISDOM, Circuit Judge:

This appeal involves the question whether the defendant understood his right to have counsel appointed to represent him

at trial and voluntarily and knowingly waived his right.

In February 1987 a grand jury returned a six-count mail fraud indictment against James M. Foster, M.D., an anesthesiologist, charging him with filing false medicare claims for anesthesia services on 27 eye operations between October 17, 1983 and November 9, 1983. The United States charges that he performed no services during the operations. Dr. Foster, represented by counsel, entered a not guilty plea at his arraignment on March 31, 1987.

The Court scheduled the case for trial on June 8, 1987. About two weeks before trial, defense counsel requested a continuance because he had been ill and needed additional time to prepare for trial. The court granted the continuance and reset the trial date for July 27, 1987. About one month before the day set

for the trial, on June 22, 1987, defense counsel filed a motion to withdraw. Dr. Foster asked that his attorney be dismissed and that he be given additional time in which to hire counsel. The court granted a second continuance with the understanding that Dr. Foster would attempt to secure counsel but might represent himself at trial. In accordance with Dr. Foster's specific request, the court rescheduled the trial date for January 20, 1988.

On September 30, 1987, however, on its own initiative, because the defendant had no counsel of record, the court conducted a hearing to determine Dr. Foster's financial ability to retain counsel. At the conclusion of the hearing, Dr. Foster informed the court that he had never entertained the idea of representing himself as "indigent" or of requesting the

court to appoint an attorney for him. Several times during the hearing Dr. Foster specifically rejected the court's offer to conduct an in-depth indigency hearing. Moreover, Dr. Foster stated unequivocally that he did not request the court to appoint an attorney based on his indigency. Five days before trial Dr. Foster requested a third continuance on the ground that he recently had received some money owed to him and that he had spoken with two attorneys who were considering representing him. The court denied this third request for a continuance. The jury convicted Dr. Foster on all six counts. We affirm.

The defendant contends that his Sixth Amendment right to counsel was violated. He argues that his waiver of his right to appointed counsel was ineffective because the court did not explain and he did not

understand that under Fed.R.Crim.P. 44(a) and 18 U.S.C. §3006(A)(b) the standard for appointing counsel is a defendant's financial inability to obtain counsel rather than indigency. Financial inability to obtain counsel is, of course, a less stringent requirement than is indigency.[1] We are mindful, however, that courts often, as did the trial court in this case, use the term "indigency" as a shorthand expression to refer to a defendant's financial inability to hire counsel.[2] Although the trial judge in this case used the term "indigency" instead of "financial inability", the record shows that the defendant understood his right to have appointed counsel and knowingly and intelligently waived his right. The defendant seemed to be principally concerned with findng [sic] a lawyer he could be "com-

fortable with", although he was also looking for one whose fee he could afford.

At the September 30 hearing, the following colloquy occurred between the defendant and the court:

> **The Court:** The purpose of this hearing, Dr. Foster, is to determine what your plans are to go forward with this case. Now, as far as having counsel represent you or not, I would like to hear your statement to the court at this time.
>
> **The Defendant:** I have not been able to find any one which I feel comfortable with representing me as an attorney. That is certainly that I can afford.
>
> **The Court:** What is your income and expenses and obligations?
>
> **The Defendant:** Well I earn about sixteen thousand dollars a year, sometimes eighteen thousand. It depends. . . . Most of it goes to living expenses and overhead and child support.
>
> ***
>
> **The Court:** Well, you stated that you have not been able to employ an attorney that you feel comfortable with. If the court determined that you were indigent . . . the court would appoint an attorney to represent you.

The Defendant: I realize that . . . neither I, nor the court, nor the prosecuting attorneys wants me representing myself, but . . . that is the best decision I am able to come up with under the circumstances....

***

The Court: Now, Dr. Foster, you really haven't asked the court to appoint you an attorney.... Are you going to ask the court to appoint an attorney based on your indigency?

The Defendant: No, your honor. I never entertained representing myself as an indigent or asking or requesting the court to appoint an attorney....

The Court: So ... you are not requesting an attorney be appointed for you at this time?

The Defendant: That's correct.

The Court: You did not request an indigency hearing?

The Defendant: That's correct, your honor. I did not request an indigency hearing.

It is clear that the defendant did not desire appointed counsel. He had been represented by an attorney and had joined in that attorney's request to withdraw.

The defendant wanted to employ new counsel, but he had his own criteria: (1) he had to feel "comfortable with" counsel and (2) he had to find counsel whose fee he could afford to pay. At no time before, during, or after this hearing did the defendant ask the court to provide him with appointed counsel. Five days before trial was set to begin, the defendant requested a third continuance because he was still attempting to employ an attorney of his choice.

A defendant has a constitutional right to represent himself at a criminal trial. Faretta v. California.[3] Because of the inherent dangers of self-representation, however, a defendant's waiver of the right to counsel must be made knowingly and intelligently.[4] To waive the right to appointed counsel a defendant must not only comprehend the nature of the right

but also must voluntarily relinquish that right. Brewster v. Williams.[5] In determining whether waiver is effective it is appropriate to consider several background factors including a defendant's age, education, and occupation.[6]

Dr. Foster is an intelligent, articulate, and highly educated medical professional. There is no evidence in the record that at the September 30th status hearing or at any other time, the defendant was confused by the court's use of the term "indigency" or that he distinguished between indigency and financial inability. The defendant twice refused the court's offer to hold a hearing to determine whether he was entitled to appointed counsel; each time he stated emphatically that he had not entertained the idea of requesting the court to appoint counsel. He would rather try the

case himself. The defendant stated that he realized that not having counsel was a serious matter and that he was aware that the court and the prosecuting attorney thought that it was in the defendant's best interest to have an attorney. During the period between indictment and trial the defendant retained and discharged counsel and consulted two legal advisors who attended conferences and hearings and filed motions on his behalf. At least one of the defendant's legal advisors was present at the trial. In an October 19, 1987 letter to the court, the defendant requested a January 1988 trial date although he still had not secured counsel. The defendant made a calculated decision to represent himself in the event that he could not hire counsel he was comfortable with before trial.[7]

Despite all of this evidence that the defendant intelligently and voluntarily waived his right to counsel, the defendant argues on appeal that the trial court should have inquired further into his financial ability to obtain counsel. The trial judge offered to conduct an in-depth hearing although he knew that the defendant earned $16,000 to $18,000 a year.

Once a defendant has been informed of the right to appointed counsel, it is incumbent upon the defendant to notify the court of his desire to have counsel appointed because of his financial inability to obtain counsel.[8] The Criminal Justice Act of 1964[9] requires the court to make an appropriate inquiry into the defendant's financial status to determine whether the defendant is entitled to appointed counsel. No particular method of determining the defendant's means, however, is re-

quired by the Act. The burden rests with the defendant to establish insufficient financial means to employ counsel.[10] The Act in no way diminishes a defendant's right to represent himself at trial; it merely requires that a court appoint counsel to represent a defendant who has not waived his right to counsel and who is financially unable to obtain counsel.

The defendant in this case at no time intimated a desire to be represented by appointed counsel. Instead, he affirmatively chose to proceed pro se with some assistence [sic] from two legal advisors. The defendant was not denied his Sixth Amendment right to counsel and the trial court did not commit reversible error by not forcing him to participate in an in-depth indigency hearing. The defendant knowingly and voluntarily waived his right to counsel. The court's denial of the

defendant's request for a third continuance to allow more time to secure counsel was not an abuse of discretion.[11]

The appellant's arguments on other issues are meritless.

We AFFIRM the defendant's convictions on all counts.

FOOTNOTES

1. U.S. v. Moore 671 F.2d 139, (5th Cir. 1982), cert. denied, 461 U.S. 859, 104 S.Ct. 183 (1983); U.S. v. de Hernandez, 745 F.2d 1305, 1310 (10th Cir. 1984); U.S. v. Harris, 707 F.2d 653 (2nd Cir.), cert. denied, 464 U.S. 997, 104 S.Ct. 495, 78 L.Ed.2d 688 (1983).

2. U.S. v. Moore, 671 F.2d 139, 141 (5th Cir. 1982), cert. denied, 464 U.S. 859, 104 S.Ct. 183 (1983). See, e.g., Davis v. Page, 618 F.2d 374, 382 (5th Cir. 1980); U.S. v. Nicholes, 841 F.2d 1485, 1504 (10th Cir. 1988).

3. 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

4. Johnson v. Zerbst, 304 U.S. 458, 464-65, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466-67 (1938); Richardson v. Lucas, 741 F.2d 753, 756 (5th Cir. 1984).

5. 430 U.S. 387, 404, 51 L.Ed.2d 424, 440, 97 S.Ct. 1232 (1977).

6. Wiggins v. Procunies, 753 F.2d 1318, 1320 (5th Cir. 1985); 8B Moore's Federal Practice ¶44.07[1].

7. After the government rested its case, the defendant, with the court's permission, showed the court a check he had received recently. The defendant stated that the check would have enabled him to hire counsel he felt "comfortable with" had the court granted his third request for a continuance. The prosecuting attorney then stated for the record that at the September 30 hearing the defendant refused the court's offer to have a hearing to determine whether the defendant was eligible for appointed counsel. The trial judge then commented to the parties, "Dr. Foster was offered the opportunity for the court to consider whether or not he should have an attorney appointed for him, and he did not wish one appointed for him and he wished to proceed on his own...". The defendant did not object to this statement nor did he add anything further on this subject. Record, Vol. 4 at 289-91.

8. See, e.g., Government of Canal Zone v. Peach, 602 F.2d 101, 105 (5th Cir. 1979); De La Fe v. United States, 413 F.2d 543, 544 (5th Cir. 1969); U.S. v. Sarsoun, 834 F.2d 1358, 1361 (7th Cir. 1987); U.S. v. Martin-Trigona, 684 F.2d 485, 490 (7th Cir. 1982).

9. 19 [sic, 18] U.S.C. §3006(A).

10. See, e.g., U.S. v. Sarsoun, 834 F.2d 1358, 1361 (7th Cir. 1987); U.S. v. Harris, 707 F.2d 653, 660 (2nd Cir.), cert. denied, 464 U.S. 997, 104 S.Ct. 495, 78 L.Ed.2d 686 (1983).

11. See, e.g., United States v. Mitchell, 777 F.2d 252, 256 (5th Cir. 1985); U.S. v. Carey, 480 F.2d 151 (5th Cir. 1973).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-4360

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

JAMES M. FOSTER, M.D.
Defendant-Appellant

Appeal from the United States District Court for the Northern District of Mississippi

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JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court

that the judgment of the District Court in this cause is affirmed.

February 28, 1989

ISSUED AS MANDATE: Apr. 10, 1989

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-4360

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

JAMES M. FOSTER, M.D.
Defendant-Appellant

Appeal from the United States District Court for the Northern District of Mississippi

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ON PETITION FOR REHEARING

(March 29, 1989)

Before WISDOM, GARWOOD, and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and

numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

s/ W. L. Garwood
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. CRW87-16

JAMES M. FOSTER,

Defendant.

WHEREUPON, the following proceedings were had before the Honorable Neal B. Biggers, Jr., Judge Presiding.

HEARING TO DETERMINE DEFENDANT'S INDIGENCE
September 30, 1987
11:30 a.m.
U. S. District Court
Oxford, Mississippi

A P P E A R A N C E S

FOR THE GOVERNMENT:
HON. THOMAS W. DAWSON
Asst. United States Attorney
Federal Building
Second Floor
Oxford, Mississippi 38655

FOR THE DEFENDANT:
Pro Se

REPORTED BY:
Marilyn C. Rea-Hinman

P R O C E E D I N G S

THE COURT: All right. We have another hearing set this morning, Number 87-14, United States of America versus James M. Foster.

Are you ready to proceed, Mr. Foster?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Dawson, is the Government ready?

MR. DAWSON: Yes, Your Honor.

THE COURT: All right. Mr. Marshal, move those people out of the courtroom. This is not a conference area.

All right. The Court has directed that this hearing take place today in a case in which James M. Foster, M.D. is under indictment in this Court. Mr. Foster on a previous day had hired an attorney. He asked that his attorney be dismissed and that he be given an opportunity to hire additional counsel. The

court granted the request of Dr. Foster and is prepared now to set the case for trial.

Dr. Foster has advised the Court that he does not have counsel at this time. The purpose of this hearing, Dr. Foster, is to determine what your plans are to go forward with this case. Now, as far as haviang [sic] counsel represent you or not, I would like to hear your statement to the Court at this time.

THE DEFENDANT: Yes, sir. Your Honor, I have interviewed several attorneys, as well as sought other counsel since my-- since my arraignment, but especially since my last appearance here when counsel withdrew. I have not been able to find anyone which I feel comfortable with representing me as an attorney. That is, certainly anyone that I can

afford. The price -- the upfront expenses have been almost twice my annual salary.

I have no money or resources, as I think the Court is probably aware, and, therefore, at this point I am proceeding on my own and taking counsel where I may be able to find it. Hopefully, I will have some way of managing the trial if it comes to that.

THE COURT: Well, you said or made the statement as the Court is aware or as the Court knows that you don't have any income or property or money. I am not aware of that. I don't know what your financial status is.

THE DEFENDANT: I assumed that you have the records, at least those that the probation officer obtained from me, but due to bad health, I filed bankruptcy in this courthouse some three years ago, and my income since then has been to live on,

but quite marginal to what they are asking in the legal business.

THE COURT: What is your income and expenses and obligations?

THE DEFENDANT: Well, I earn about sixteen thousand dollars a year, sometimes eighteen thousand. It depends. I cannot tell you exactly what my income has been this year. Most of it goes to living expenses and overhead and child support. I have virtually no discretionary income.

THE COURT: What kind of work do you do?

THE DEFENDANT: Part time as a preventive medicine physician and occasionally I work in emergency rooms, a free-standing medical facility. I work for others. I work on an eight hour basis a day and according to the terms of the contract.

THE COURT: And where do you work?

THE DEFENDANT: In New Orleans, the greater New Orleans area.

THE COURT: What type of medicine do you practice?

THE DEFENDANT: Preventative and nutritional medicine.

THE COURT: Do you have a specialty?

THE DEFENDANT: I am board certified in anesthesiology, but have not practiced in almost three years now for health reasons. I have hepatitus [sic], and everytime I go back into anesthesiology I contact it. There is a vast difference in my income between then and now.

THE COURT: Well, you stated that you have not been able to employ an attorney that you feel comfortable with. If the Court determined that you were indigent, and I am not sure that ever would be done, but if it were done, the Court would appoint an attorney to represent you.

However, it would be an attorney that the Court chose and not one that you chose, so it is very likely that you would not be comfortable with that attorney either. That is a possibility that the Court is considering.

Do you have anything else that you wish to state?

THE DEFENDANT: I realize that it is something that neither I, nor the Court, nor the prosecuting attorneys wants me representing myself, but at this point that is the best decision I am able to come up with under the circumstances as I find it.

THE COURT: All right. Mr. Dawson, do you have anything that you wish to state in this regard?

MR. DAWSON: Your Honor, like the Court, I am not convinced at this point that the Defendant is entitled to a Court

appointed attorney, and in view of his statement about his inability, between here and New Orleans, I suppose, to find counsel to represent him that he feels comfortable with, I am not sure that even if the Court appointed counsel qualified that we would have a situation where the Defendant would be pleased to the extent that he would accept that counsel over his apparent right to represent himself in the Federal Court system. It appears--

Well, first of all, let me say one thing that I do agree with Dr. Foster, and probably the Court does, is that I think it is in his best interest to be represented by trial counsel, should this case go to trial and before a jury. Dr. Foster might not be able to see that or make a judgment leading to that conclusion at this time, but I think we all can agree

that it would be to his best interest to have trial counsel.

Apparently, by statute, he has the right to represent himself if he chooses to do so. In fact, the Supreme Court of the United States has said so.

THE COURT: I have no problem with him representing himself. I am not concerned about that.

MR. DAWSON: Yes, sir. That being the case, I don't-- I cannot think of any alternative other than to set the trial date and for a date certain and proceed. We cannot make Mr. Foster or Dr. Foster go hire an attorney. However, I know the Court and the Government does not want to get in a position of a trial date being set and proceeding with the idea that Dr. Foster is going to represent himself, and then at the last minute we have counsel

coming in and use that as a basis to get another continuance.

I think it should be emphasized to Dr. Foster that when this trial date is set, that excluding any unusual circumstances, that the trial will be set and--

THE COURT: Refresh my recollection. Has this been set for trial once before?

MR. DAWSON: Yes, Your Honor. It was set for trial originally in July of 1976--1987. Wait just a moment. I believe it was June of 1987, and pursuant to a motion by the Defendant, one of the reasons being the necessity to hire additional counsel, this case was continued. It has been continued since that time, so-- the case was indicted, I think, back in the early Spring, around February or March of this year.

THE COURT: I see.

MR. DAWSON: So, the Defendant has had a substantial period of time to gain not only counsel but also to be very familiar with the discovery, which-- about which I would like the record to reflect that we have furnished all material under Rule 16 to Dr. Foster, and, in fact, Dr. Foster has furnished some information to us in reciprocal discovery under Rule 16, and that has been done for some time.

I don't know of any additional reason, other than the counsel issue which we now find ourselves in to postpone the case.

May I have a moment, Your Honor?

THE COURT: All right.

MR. DAWSON: I do notice, Your Honor, that the Defendant has filed separate motions, which we have responded to, and maybe before the magistrate and maybe some before Your Honor. We--they are mainly

motions that do not require either evidentiary or oral argument, but other than that, I think the case is in the posture for trial.

THE COURT: All right. Now, Dr. Foster, you really haven't asked the Court to appoint you an attorney. Before the Court would even consider that, I would have to be satisfied that you are indigent and that would require financial disclosure from you, and I would allow the Government to put you on the stand and conduct an examination of you, if questioned, to satisfy myself that you are indigent. I don't know, however, if you even want us to go into that.

Are you going to ask the Court or do you wish to ask the Court to appoint an attorney based on your indigency?

THE DEFENDANT: No, Your Honor. I never entertained representing myself as

an indigent or asking or requesting the Court to appoint an attorney, nor am I trying to delay the proceedings, in whatever fashion they ultimately turn out.

I am a non-professional defending myself in a serious matter that can have serious consequences for me. I do need all of the help I can get, sort to speak, from the standpoint that I am-- I still do not have a clear bill of particulars, which I have motioned for, to prepare an adequate defense of the charges that I do not even understand, and I did not participate much in the --

THE COURT: So, you are telling the Court, then, that you are not requesting an attorney be appointed for you at this time?

THE DEFENDANT: That's correct.

THE COURT: You did not request an indigency hearing?

THE DEFENDANT: That's correct, Your Honor. I did not request an indigency hearing.

THE COURT: All right. Then the Court is going to set the case for trial, and it will be up to you to either be here to represent yourself or to have counsel with you at that time.

THE DEFENDANT: Yes, sir.

THE COURT: As you work it out. All right. I will look at the calendar and set it in the near future. I am not sure-- I have no idea when yet, but you will be notified of the trial date.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: All right. If nothing else, we will be in recess.

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APPENDIX E

EXCERPTS FROM PROCEEDINGS OF JANUARY 26, 1987 RELATIVE TO DOCUMENTATION THAT DEFENDANT HAD RECENTLY OBTAINED FUNDS TO ENABLE HIM TO RETAIN COMPETENT COUNSEL

Record on Appeal, Volume 4, page 288

DR. FOSTER: Could I talk with you? This is off the record. I just wanted to show you one piece of paper to show you my intent about a previous issue that has already been settled.

THE COURT: I will let you do that after I excuse the jury.

DR. FOSTER: That's what I mean.

(Open Court.)

* * * * * * *

Record on Appeal, Volume 4, pages 289-292

(Jury Out)

THE COURT: All right. Dr. Foster, what is it that you wanted to present?

You said that you had a document that you wanted to present to the Court.

DR. FOSTER: Yes, sir. When--

THE COURT: Is this something you don't want --

DR. FOSTER: This is something personal that I wanted to show you to explain a motion earlier.

THE COURT: Well, anything -- anything in the trial should be on the record.

DR. FOSTER: Okay.

THE COURT: You need to have something on the record. The jury is not here, so you can state it out at your position.

DR. FOSTER: Okay.

THE COURT: Out at your table.

DR. FOSTER: As you know, I filed a motion approximately a week or week and a half before this scheduled trial date for a continuance, saying that I had found an attorney that I felt comfortable with and finally had funds to secure it, and I just wanted to present evidence in the form of a check that I finally received that would allow me to secure this person, which I never had control over. Somebody owed me some money and finally six months later they paid me. This is just so the Court will know that this was not purely a deliberate delay and tatic [sic] on my part. I do have some evidence, the funds have become available, but since the continuance was denied, it was pointless to proceed because neither of the two attorneys would agree at these sums of money and that I was comfortable with felt

that they wanted to take on a case at this late date.

THE COURT: All right. I will take your representation on that with no question about it. I understand and I recall that you did make a motion that you felt like you could employ counsel, and for the reasons stated previously, the motion for continuance was denied, and so I will -- I have no questions about your representation that you did have money recently come into your possession that you did not have previously.

DR. FOSTER: That is all I wanted.

MR. DAWSON: Your Honor, along those lines, I would like to state for the record that-- so the record will be clear-- that this recent acquisition of some funds that the Defendant has just referred to is not to be taken that prior to that time he was indigent, because, as I re-

call, on September the 30th or thereabout, the Court held a hearing concerning this proceeding, and the Defendant stated that he was not indigent for the purpose and declined to have an indigency hearing to determine whether an attorney could be appointed for him, that he at all times maintained that he could employ counsel but that part of the problem was finding a counsel that he felt comfortable with and a fee he felt comfortable with to pay for these services, so I would not want the statement just made by the Defendant to be construed that at any time during-- since his indictment up until the middle of this trial that he has been without funds with which to hire counsel, so, therefore, he was not determined to be indigent under the terms of the Act.

THE COURT: I think the record is clear on that from the past hearings that

Dr. Foster was offered the opportunity for the court to consider whether or not he should have an attorney appointed for him, and he did not wish one appointed for him and he wished to proceed on his own, and on the condition his other counsel could be released at his request, which the Court allowed him to do.

All right. Is there anything else?

DR. FOSTER: One more item, Your Honor.

THE COURT: All right.

[Bench Conference on unrelated matter was then had.]

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